The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards in Peacetime

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INTERNATIONAL LAW HAS, at least since the time of Grotius, recognized the right of States to regulate the seas adjacent to their coasts and to enforce their laws against foreign vessels. The rights of regulation and enforcement included principally the subjects of customs, fisheries, health and immigration. Until the twentieth century, coastal States were primarily concerned with the protection of their territory, including their neutrality in cases of war between other States. In the present century, additional concerns have arisen: the conservation and management of the diminishing living resources of the sea and seabed, the exploration and exploitation of the nonliving resources of the seabed, and the protection and preservation of the marine and coastal environment.

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sea. The Convention is comprehensive and detailed in these respects. In respect of the manner of enforcement of these sovereign rights and jurisdictions, however, the Convention is for the most part silent. Resort must be had to principles and rules of customary international law in assessing the rights and responsibilities of States in the enforcement of their powers and rights under the Convention.

In the exercise of those powers of regulation that cannot, or cannot always, be carried out by authorities on land, States have used a variety of vessels and officials. Some States deploy their navies and air forces in this role, supplementing them where necessary with vessels and officials operated and staffed by such agencies as customs, environment, fisheries, health, and immigration departments. Other States have a designated coast guard service, which carries out all law enforcement activities at sea in peacetime.

Where navies are used in peacetime law enforcement roles, it is obvious that much of the training directed towards their primary task is also relevant to the task of policing maritime zones. In particular, the principle of graduated force has application in the exercise of the right of approach, stopping, boarding, searching and seizing foreign merchant vessels. Rules of engagement and special procedures are regularly rehearsed and exercised. Where a coast guard or other governmental enforcement agency is employed in these roles, it too will, or should, be guided by the same principles and rules. Moreover, in time of armed conflict these maritime forces are likely to be integrated into the war effort, and their crews must be capable of swift adaptation to traditional naval roles. The cross-fertilization of experience between roles, and between the forces employed in those roles, ought to be consciously encouraged in times of peace.

The modern international law of the sea, with its concession of expansive zones of national sovereignty or jurisdiction, together with its concerns for access to natural resources, navigational freedoms, and the protection of the natural environment, presents many possibilities for dispute between States. Unlawful, unjustifiably forceful, or clumsy law enforcement can be the occasion not only of disputes but even of armed conflict.

States take up their rights of sovereignty and jurisdiction in their maritime zones and exercise them in accordance with their domestic laws. These laws may or may not be in accordance with international law. In some cases, domestic laws with respect to enforcement may date back to earlier times and may be inconsistent with modern international law, or, being administered by different departments, lack congruity with other domestic laws.
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A distinction is commonly observed in the assertion and exercise of sovereign rights and jurisdiction in national maritime zones and on the high seas between nationals and national vessels of the enforcing State, and foreign vessels and persons. This distinction derives from two considerations. In the first place, international law does not, in general, concern itself with matters arising between a State and its own citizens, especially in relation to the enforcement of laws to which the citizen owes obedience. In the second place, constitutional considerations may arise as to the use of the regular armed forces, as distinct from police and other civilian governmental agencies, in the enforcement of laws against citizens.


There was an evident reluctance at the Third United Nations Conference on the Law of the Sea (UNCLOS III) to formulate in detail prescriptions of the manner of enforcement of the various sovereign rights and jurisdictions accorded to coastal States by the resulting Convention. Where the Convention incorporates the texts of the four Geneva Conventions of 1958, the same euphemisms or evasions are repeated. In the parts of the LOS Convention that are new, references are scattered and are not harmonious, reflecting the division of UNCLOS III into three main committees and various working groups.

The Territorial Sea. Since a coastal State’s full sovereignty extends to its territorial sea, in principle it enjoys plenary powers of enforcement of its laws in those waters. However, in view of the international community’s interest in the right of innocent passage through territorial seas, and especially in the right of transit passage through, over, and under those parts of the territorial sea that comprise straits used for international navigation, certain restrictions are placed on enforcement powers.

In relation to innocent passage, there is a general restriction that a coastal State “should not” exercise its criminal jurisdiction on board a foreign vessel to arrest any person or conduct an investigation unless the consequences of the crime, committed on board the foreign vessel while in passage, extend to the coastal State; the crime affects the peace of the coastal State or the good order of the territorial sea; assistance has been requested by the master of the vessel or the authorities of the flag State; or such measures are necessary for the
suppression of the illicit traffic in narcotics. It will be noted that the words used are “should not” and are thus not an outright prohibition (LOS Convention, art. 27(1)). However, this mild restriction does not apply to an arrest or investigation on board a vessel in the territorial sea after it has left the internal waters of the coastal State. Nor does it apply in respect of offenses committed against laws validly applying in the exclusive economic zone (EEZ), where the vessel has subsequently entered the territorial sea. The sole outright prohibition is of arrest and investigation on board a foreign vessel in innocent passage in respect of crimes committed on board before the vessel, proceeding from a foreign port, entered the territorial sea. An exception is enforcement actions taken pursuant to laws applying in the EEZ and to certain marine pollution offenses, as allowed under Part XII of the LOS Convention.

By contrast, in relation to the exercise of civil jurisdiction by way of arrest or levy of execution against a vessel in innocent passage, the prohibition is made mandatory by the LOS Convention, Article 28(2), except in respect of obligations or liabilities assumed or incurred by the vessel itself in the course of or for the purpose of a voyage through the waters of the coastal State.3

It is axiomatic that in the territorial sea as elsewhere at sea and on land, the international law doctrine of sovereign immunity forbids any interference with, or attempt at law enforcement on board, a foreign warship or a government vessel in noncommercial service. However, it is unclear whether vessels exercising their rights of transit passage through straits have any degree of immunity from being stopped and boarded (or aircraft from being diverted and ordered to land).3 There is no express provision in the Convention allowing for the enforcement—as distinct from the prescription—of coastal State laws. Article 34, dealing with the legal status of waters forming straits used for international navigation, does not entirely resolve the problem, since it is not clear whether it means that all other provisions relating to the territorial sea apply except insofar as they are inconsistent with a provision applying to transit passage, or whether it is speaking merely of prescription and not of enforcement, which is subject to the specific regime of Part III.4 The undoubted implication is that such powers should be exercised with restraint and only be invoked, by analogy with Article 27, where there are significant effects on the coastal State, or under general international law by way of self-preservation in the face of an imminent peril. Article 38(3) provides that “any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of the Convention.” This may be understood to bring in Article 25, allowing the coastal State to take the “necessary steps” in its territorial sea to prevent passage that is not innocent. The applicability of
Article 25 is made plausible by the consideration that, before the entry into force of the LOS Convention, the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, and customary international law, regarded straits transit passage as merely a nonsuspendable form of innocent passage. A generally cautious approach appears to be confirmed by the LOS Convention, Article 233, which provides for the exercise of enforcement powers specifically in relation to pollution offenses by vessels transiting straits only where the violation causes or threatens major damage to the marine environment of the straits. State practice under the Convention may clarify the matter in future. State practice before the Convention came into effect would support the existence of a general power to enforce laws against vessels transiting straits, at least where the offenses are serious.5

Nothing is said in the Convention generally about the manner of enforcement by the coastal State of its laws in the territorial sea. In relation to vessels in innocent passage, it provides that “the coastal State may take the necessary steps in the territorial sea to prevent passage which is not innocent.” The expression “necessary steps” derives from the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, Article 16(1), and broadly encompasses the standard procedures of approach, stopping, boarding, investigation, and possible arrest. The word “prevent,” however, if it stood alone and had no earlier history, might suggest that a coastal State had the power only to prevent non-innocent passage by, not arrest and punish, the foreign vessel. But such an interpretation would be inconsistent with the presumption of full residual sovereign powers in the territorial sea. It would also be contrary to the clear implications of Articles 27(5) and 220(2) of the LOS Convention, the latter provision relating to the enforcement of pollution laws in the territorial sea, including in relation to vessels in innocent passage. The power to “prevent” merely offers the coastal State, in this context, a more agreeable alternative to arrest and prosecution of an offending vessel, that is, by barring its access or diverting it away from the territorial sea.6

Archipelagic Waters. Although the theory on which claims to archipelagic waters were made, beginning with Indonesia in the 1950s, would necessarily regard them as internal waters and thus even more firmly under exclusive coastal State sovereignty than territorial waters, the development and acceptance of the concept during UNCLOS III resulted in a substantial equating of archipelagic waters with territorial waters, and archipelagic sea lanes passage with transit passage through and over international straits. The wording of LOS Convention Article 49 on the legal status of archipelagic
waters is substantially identical with that of Articles 2 and 34. There is a right of
innocent passage through archipelagic waters not included in archipelagic sea
lanes, and the regime expressly incorporates by reference the whole of Part II,
Section 3, of the Convention on innocent passage in the territorial sea (LOS
Convention, art. 52(1)). Similarly, the regime of archipelagic sea lanes passage
and overflight applies Articles 39, 40, 42 and 44 on transit passage through and
over straits mutatis mutandis (LOS Convention, Art. 54). Whatever fine points
of distinction between archipelagic sea lanes passage and straits transit passage
there may be argued to exist,7 from the point of view of law enforcement the
legal environment of archipelagic waters is not substantially different from that
of the territorial sea.

The Contiguous Zone. The contiguous zone, under the LOS Convention, may
extend to a maximum breadth of twenty-four nautical miles from land or from
territorial-sea baselines. It occupies the sea area lying between that limit and
the outer limit of the territorial sea. In relation to the four kinds of laws
applying to its land territory or its territorial sea, in which prevention or
enforcement activities may be carried out in its contiguous zone (customs,
fiscal, immigration, and sanitary laws), the coastal State “may exercise the
control necessary to” prevent infringement of those laws by inbound vessels or
to punish infringements committed by vessels in its territory or territorial sea
when they are outward bound in the contiguous zone (LOS Convention, art.
33).

The phrase “may exercise the control necessary to” in Article 33 should be
compared with the phrase “may take the necessary steps” in Article 25(1),
applying to the territorial sea, discussed above. Is there a practical difference? It
must be remembered that the contiguous zone is not a zone of coastal State
sovereignty or even of coastal State jurisdiction; it is a police zone.6 Its residual
status, even taking into account that it is included in the exclusive economic
zone, is that of high seas. As a consequence, the rights exercisable by the
coastal State in its contiguous zone are of a distinct character and are to be
accorded differently depending on whether the action taken is preventive or
punitive. In the former case (inbound vessels), it is arguable that arrest is
precluded, since by definition no offense has yet been committed. In the latter
case (outbound vessels) an offense has been committed and may be dealt with
accordingly; this requires no more qualification of coastal State powers than of
hot pursuit, except that the pursuit need not have begun in the territorial sea.9
The right to arrest inbound vessels in the contiguous zone in respect of
apprehended immigration offenses was left open by the Privy Council in 1948
by reason of the fact that the vessel concerned was stateless;\(^{10}\) the right to arrest may still be in doubt, but it might be cured by the enactment by a coastal State of a law applicable in its contiguous zone prohibiting navigation with the intention of breaching coastal State laws in its territorial sea or territory.\(^{11}\)

The Exclusive Economic Zone. As might be expected from the limitation of a coastal State’s legislative powers over its EEZ, and the high value placed on the freedoms of navigation enjoyed by other States in the zone (subject only to the rights and jurisdiction given the coastal State in relation to the natural resources of the zone and structures connected therewith), the specification of enforcement powers is expressed by the LOS Convention in notably circumscribed terms. Indeed, the very fact that enforcement powers are spelled out in Part V of the Convention, dealing with the regime of the EEZ, whereas they are merely assumed or implied in relation to the territorial sea, archipelagic waters, and the contiguous zone, indicates that they are regarded as more sensitive matters and are to be construed strictly.

A general limitation on enforcement of rights, imposed by Article 56(2) of the LOS Convention, is that “in exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.” This general limitation applies in respect of all the resources of the EEZ, not merely the living resources.

The specific powers of enforcement given to States in their EEZs by the Convention is, however, only in relation to the free-swimming living resources of the zone. LOS Convention, Article 73 provides:

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
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4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

It is to be noted that Article 73 does not apply to the nonliving natural resources, such as gas, oil, and minerals, nor to the living sedentary species of the zone, which are regarded as belonging to the regime of the continental shelf. Because the sovereign rights of the coastal State over nonliving and sedentary resources of the EEZ (and of the continental shelf, where that shelf extends beyond the outer limit of the EEZ) are stated to be exclusive, it was thought unnecessary at UNCLOS III to give to coastal States express power to enforce those rights. The Geneva Convention on the Continental Shelf of 1958 is similarly silent; the power to enforce is implicit.

The reason why the power and manner of enforcement by coastal States of their rights in the water column of their EEZs should be stated explicitly, whereas in other zones of national maritime sovereignty or jurisdiction those powers are implicit, is that the EEZ is governed by an artificially created regime that required the striking of a delicate balance between coastal State interests in conserving and managing living natural resources and the interests of other States in the traditional freedoms of navigation. To underline this point, the LOS Convention provides that in relation to disputes concerning the release of arrested vessels, compulsory jurisdiction is given to the courts and tribunals specified in Article 287, or, failing agreement on another court or tribunal, to the International Tribunal for the Law of the Sea (LOS Convention, Art. 292).

Separate consideration will be given below to the special position with regard to the enforcement of pollution laws in the EEZ.

The High Seas. The high seas, being regarded from the time of Grotius onward as either res nullius or res communis and incapable of appropriation by any State, are an area in which in principle there is no right by any State to interfere with the free navigation of vessels and aircraft. The exceptions are set out in Article 110 of the LOS Convention:

- Vessels of the same nationality as the intercepting warship or aircraft. The exception also applies to vessels which, although flying a foreign flag or refusing to show a flag, are in reality vessels of the nationality of the intercepting State.
- Vessels without a nationality. These may include unregistered vessels whose national origins or connections are uncertain. Vessels sailing under two
or more flags, displaying them according to convenience, may be assimilated to vessels without a nationality. This reference to “convenience” is not to be confused with the popular expression “flags of convenience,” which refers to vessels registered in countries having open registries or favorable or more relaxed registration rules. These vessels do have the nationality of the State of registration, notwithstanding that in some cases the control exercised by the flag State is not as effective as it ought to be.17

- Vessels engaged in piracy, the slave trade, or unauthorized broadcasting.
- Where the acts of interference derive from powers conferred by treaty, either a bilateral treaty between the intercepting State and the flag State, or a multilateral treaty.18

There is a right for warships to verify the flag in any of the cases above. But if suspicions prove to be unfounded, and the intercepted vessel has not committed any act justifying them, that vessel is entitled to compensation for any resulting loss or damage.19

The 1982 LOS Convention does not deal with the law of armed conflict. Hence it must also be taken into account that acts of interception, boarding, and arrest may take place on the high seas in the exercise of belligerent rights, in self-defense, or in execution of decisions of the United Nations Security Council.

**Hot Pursuit.** International law allows for the hot pursuit of vessels in the high seas, and arrest there, where an offense has been committed on the land territory, internal waters, the territorial sea, or in the EEZ of the pursuing State. Where the hot pursuit begins in the contiguous zone, it may be conducted only in respect of violations of the rights for which that zone was established. The position is the same in relation to pursuit beginning in the EEZ. Pursuit may only be commenced after a visual or auditory signal has been given at a distance which enables it to be seen or heard by the foreign ship. The right of hot pursuit terminates when the pursued vessel enters the territorial sea of its own or of a third State.20 There is no reason to terminate the pursuit merely because the pursued vessel enters the EEZ of its own or of a third State.

Although the article on hot pursuit in the Convention appears only in Part VII (the High Seas), it must be remembered that this Part applies also to the EEZ, by reason of Article 58(2), insofar as its provisions are not incompatible with the regime of the EEZ. Hence, a right of hot pursuit may begin in the territorial sea or contiguous zone and end in the EEZ.
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According to customary international law the pursuit must be “hot and continuous,” that is, sight (which can include identification on radar) must not be lost or interrupted. Where pursuit is begun by an aircraft, the Convention provides that it must be continued until a warship or another aircraft can take over the pursuit without interruption. It is not enough for the aircraft merely to record a sighting; it must give a signal to the delinquent vessel to stop. The position is taken in two Australian enactments that “the pursuit of a person or a boat is not taken to be terminated or substantially interrupted only because the officer or officers concerned lose sight [defined to include losing output from a radar or other sensing device] of the person or boat.” Although this position may seem a generous interpretation of customary international law, it is probably in accordance with modern realities.

Offenses against Marine Pollution Laws. The protection and preservation of the marine environment were regarded as such important issues at UNCLOS III that a separate Part of the Convention (Part XII) is devoted to the subject.

The essential scheme of the LOS Convention, relies on three enforcement authorities in relation to pollution offenses: the flag State of the delinquent vessel; the port State visited by the delinquent vessel after the offense; and the coastal State whose laws have been violated. It is evident from the provisions of Part XII of the Convention that in the interests of freedom of navigation, these alternatives are in descending order of preference: Articles 217, 218, and 220.

Under this scheme the flag State of the delinquent vessel always has jurisdiction to prosecute its own vessel, wherever the offenses may have occurred, and it must do so when violations of national laws adopted in accordance with applicable rules and standards (principally the Conventions sponsored by the International Maritime Organization) have occurred. The port State’s jurisdiction is mainly concerned with investigation and reporting to the flag State, but it may institute proceedings itself at the request of the flag State or of the coastal State affected. It may also institute proceedings if it is affected in its capacity as a coastal State, where its own territorial waters or EEZ have been polluted.

Coastal State powers over polluting foreign vessels are set out in Article 220. This article is arranged in such a way as to require a higher threshold to be crossed before enforcement action can be taken the farther from the coast the offense is detected. If the delinquent vessel is voluntarily within a port of the coastal State affected, proceedings may be brought in respect of pollution offenses committed in the territorial sea or the EEZ of that State. If the vessel is navigating in the territorial sea of the coastal State and there are “clear grounds
for believing” that it has committed a pollution offense in the territorial sea, the coastal State may apprehend and prosecute. If, however, the vessel is navigating in the territorial sea or the EEZ and there are “clear grounds for believing” that an offense was committed in the EEZ of the coastal State, that State may not institute proceedings but may only require the vessel to give information regarding its identity and its last and next ports of call (i.e., in order to facilitate a prosecution by either the flag State or the port State). However, in the last set of circumstances, if the violation in the EEZ has resulted in a substantial discharge causing or threatening significant pollution of the marine environment, the coastal State may undertake a physical inspection of the vessel, but still not prosecute. But finally, if there is “clear objective evidence” that a vessel in the situation of the last two cases has caused “major damage or threat of damage to the coastline or related interests of the coastal State, or to any of the resources of its territorial sea or exclusive economic zone,” then—and only then—may the coastal State prosecute in respect of pollution offenses committed in its EEZ.

The flag State of the delinquent vessel may step in under Article 228 of the Convention and assume jurisdiction itself where a coastal State has already instituted proceedings in relation to pollution offenses in its EEZ, provided it does so within six months. In that event the coastal State must suspend its own proceedings, unless those proceedings “relate to a case of major damage to the coastal State, or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels.”

An exception to all of the above is the case of dumping. The term “dumping” is not defined in Articles 210 and 216 of the LOS Convention except by way of reference to the “international rules and standards established through competent international organizations or diplomatic conference for the prevention, reduction and control of pollution of the marine environment by dumping.” At present, the chief such international instrument is the London Dumping Convention of 1972,23 which lists prohibited and restricted substances in annexes. In the case of dumping (which is a deliberate and not a negligent activity), the coastal State may enforce its laws in respect of offenses committed in its territorial sea, its EEZ, or on its continental shelf; notwithstanding that the flag State may also have instituted proceedings.

The implications of these purely conventional provisions (their status as customary law has yet to be established) for freedom of navigation are obvious. Confrontation between States might well take the form of a denial by one State of navigation rights to the merchant ships, and especially oil tankers, of
another on the pretext of pollution offenses. The provisions of the Convention make such denial transparently unlawful, except in the case of a deliberate act of dumping or a clearly established act of pollution of great magnitude.

The translation of the Convention rules into the national laws and operational procedures of States must be closely watched in future. Even in the case of States whose laws automatically incorporate the terms of international conventions, duly ratified, the terms of the articles discussed above may be subject to varying interpretations.

The Use of Force Against Delinquent Vessels

The LOS Convention is markedly silent on the specification of the degrees of force that may be used against vessels that refuse to stop when ordered to bring to, or resist boarding, search, or arrest. All of the provisions of the Convention that authorize or imply such police measures appear to assume that the delinquent vessel will meekly submit to “enforcement measures” or “necessary steps.” There was a disinclination at UNCLOS III to discuss such distasteful matters.

Guidance must therefore be sought in customary international law and from general principles of law. The general international law rule, applicable to self-defense and police-type measures alike, is that no more force may be used than is strictly necessary to achieve the legitimate objective and is proportionate and reasonable in all the circumstances. In respect of police-type enforcement actions, evidence of State practice tends to be anecdotal and variable, with some States resorting to the immediate use of weapons to compel submission, while others are more patient in exhausting peaceful means.

The scant arbitral decisions on the point support the latter approach. The I’m Alone was an arbitration in 1933–1935 between Canada and the United States concerning the sinking of a rum-runner and loss of life on board. It had failed to heave to after a lengthy chase and was fired into by a U.S. Coast Guard cutter. The arbitration commissioners held that necessary and reasonable force might be used for the purpose of boarding, searching, seizing, and bringing into port a suspect vessel; if sinking should occur incidentally as a result of the exercise of necessary and reasonable force, the pursuing vessel might be blameless. But in this case, the admittedly intentional sinking of the suspect vessel was not justified.

It is difficult to understand this decision in the light of the facts, which included a hot pursuit lasting two days during which the I’m Alone tried to outrun and outmaneuver its pursuer, except on the unstated basis that a
deliberate sinking will in no circumstances (other than in self-defense where violent resistance is employed or threatened) be warranted if the offense involved is a customs (i.e., purely regulatory) offense. In other words, the proportionality principle requires the enforcing State to weigh the gravity of the offense against the value of human life. Rum-running (during the Prohibition era of the United States, which had ended just before the arbitration) did not strike the commissioners as sufficient to warrant such drastic action. They did not have to consider other cases. It is suggested that fisheries, revenue, immigration and other regulatory offenses would fall into the same category. So might pollution offenses. This is not only because sending a vessel with dangerous cargoes or wastes on board to the bottom might only compound the danger, but because of the Convention scheme, outlined above, under which the flag State can be required to take enforcement action against a delinquent vessel escaping immediate arrest. Other cases might justify the use of more vigorous, and perhaps ultimately deadly, force, such as piratical vessels, vessels carrying arms to dissidents in the enforcing State, or craft carrying large quantities of narcotic drugs. These cases might be argued to have the character of self-defense or self-preservation more than of enforcement of regulatory laws.

The Red Crusader was also a case involving a regulatory offense, unlawful fishing. It was an arbitration between Denmark and the United Kingdom. In that case, a boarding party from the Danish fisheries patrol vessel had been overpowered and locked up by the crew of an arrested Scottish trawler. The trawler then turned and made a run for home waters. A lengthy chase ensued in which the Danish vessel fired repeated warning shots. Finally shots were fired at the bridge and into the hull of the trawler, despite which the trawler succeeded in escaping. The United Kingdom claimed that the force used had been excessive. The arbitral tribunal agreed, finding that the force used was “without proved necessity.” It held that “other means should have been attempted, which, if duly persisted in, might have finally persuaded Skipper Wood to stop and revert to normal procedures.”

The lesson of these arbitral cases is that force endangering human life is not justified, at least where purely regulatory offenses are concerned. A premium is thus placed on the skill and equipment of enforcement vessels. Those vessels must have adequate visual and auditory signaling capacity, and speed, seakeeping capability, and maneuverability adequate to their task. In all cases, warning shots are to be used before fire is directed at unmanned parts of the pursued vessel. Even warning shots should not be used without first resorting to other methods of ordering the vessel to stop. Methods other than gunfire are
to be used wherever possible, where the pursued vessel refuses to stop, e.g., by outmaneuvering, high-pressure water hoses to short out electrical systems, harpooned lines to foul the screws, etc. Instant ship-to-shore communications are also important in supplementing, where necessary, rules of engagement, and for receiving specific instructions from the responsible authorities.31

The sole reference in the LOS Convention to the degree of force to be used in enforcement measures appears in Article 225, which states: "In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk."

In the light of what has been said, it may be wondered what "endangering safety" would be if the pursued vessel deliberately evaded a legitimate approach by an investigating or enforcing State vessel. The only sensible construction of Article 225 is to read it subject to the general international law principles of necessity, proportionality, and reasonableness, and not as a blanket prohibition against the use of any degree of force in any circumstances.

The case of offending civil aircraft raises a special consideration of what is necessary, proportionate, and reasonable. Aircraft in flight cannot be "stopped" in the way that surface vessels can be; also, they are extremely vulnerable to the exercise of the slightest degree of force. They may be intercepted and ordered to land at a designated airport, but they may not be fired on. Following the incident of the shooting down of a Korean Airlines passenger aircraft over Soviet territory in 1983, a Protocol relating to an Amendment to the Convention on Civil Aviation was adopted at Montreal in 1984.32 Article 3 bis was added to the Convention in the following terms:

The contracting states recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of the aircraft must not be endangered. This provision shall not be interpreted as modifying in any manner the rights and obligations of States set forth in the Charter of the United Nations.

This provision clearly reserves the right of self-defense against armed attack under the UN Charter and customary international law.33

The possibility exists that there may emerge an international jurisprudence on the subject of law enforcement activities at sea. Part XV of the LOS Convention provides for the settlement of disputes arising under the Convention. It is a complex scheme, combining compulsory elements with a
number of limitations and optional exceptions. States may declare that they accept the jurisdiction of the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII of the Convention, or a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.34

The provisions of Part XV, Section 3, which contain the limitations and exceptions to the applicability of compulsory procedures entailing binding decisions, almost defy a reading that would make clear what is included in the obligation to submit to compulsory dispute settlement procedures as distinct from what is not.35 Disputes concerning law enforcement activities are listed among the optional exceptions to compulsory dispute settlement, but only "in regard to the exercise of sovereign rights and jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3."36 Those two paragraphs refer to marine scientific research and fisheries, respectively, but only so far as to exclude compulsory jurisdiction in respect of the exercise of coastal State discretions under the Convention. If a coastal State sought to impede navigation or overflight through the assertion of rights not granted by the Convention, there would be jurisdiction over the assertion, as well as over the manner of its exercise. Expressly included in the compulsory dispute settlement procedures are cases:

a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58; ... 

(c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.37

Thus a balance is struck in Part XV, as in Part V of the Convention in relation to the EEZ itself, between the sovereign rights and jurisdiction of coastal States and the interests of the international community in freedom of navigation.

The above provisions are directed to cases arising in the EEZ, since Article 297(1) refers to "the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the Convention." The expression "sovereign rights or jurisdiction" is a term of art in the Convention and refers only to the EEZ and
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continental shelf. It seems anomalous, but the provisions of Part XV limiting and excepting obligations to submit to binding dispute settlement procedures appear to leave entirely open disputes concerning the exercise of powers in the territorial sea and archipelagic waters, since in these areas the coastal State has sovereignty. Thus the enforcement of coastal State laws in territorial seas and archipelagic waters, including in relation to straits transit passage and archipelagic sea lanes passage, might be made the subject of compulsory reference to judicial or arbitral procedures.38

Restraints on the Use of Force Imposed by Domestic Law

In proceedings for the enforcement of the various national laws applying in the maritime zones of the coastal State, the issue of the use of force may be raised. Damages in separate civil proceedings may be sought by an apprehended person or shipowner in relation to the use of excessive force, although this right may be limited by law.39

Under the common law, the act of State doctrine may be raised as a defense by a naval or other government officer against an action brought by a foreign citizen in the enforcing State's courts in respect of a tortious act committed against that person or a foreign vessel on the high seas or in a foreign place in the execution of duty.40 If the tortious act (e.g., an excessively forceful arrest of a foreign fishing boat) occurs in territorial waters, however, the act of State doctrine will not apply. Territorial waters will be regarded as equivalent to territory for the purposes of the doctrine.41 Will the contiguous zone and the exclusive economic zone be excluded also from the application of the act of State doctrine? There is no direct authority, but it is arguable that in the exercise of sovereign rights and jurisdiction within an area conceded by international law to the coastal State, and conducted pursuant to national laws which give effect to those rights and jurisdictions, that area should be treated as national territory for purposes of the act of State doctrine. Indirect support for this view is found in the United Kingdom Sea Fisheries Act of 1968,42 which protects an officer from civil or criminal proceedings in execution of the Act in areas of proclaimed fishery limits.

It does not appear to be common practice, at least in countries of the common law, to provide for a statutory code of enforcement practices in relation to law enforcement at sea. Instead, law enforcement officers charged with maritime duties are guided by the common law and by any general statute governing the use of force in apprehending offenders.
The common law on the use of force in effecting an arrest can be taken from the following passage from the Criminal Code Bill Commission Report of the British Parliament (1879):43

We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportionately [sic] to the injury or mischief which it is intended to prevent.

The common law also distinguishes between the powers of arrest possessed by any person and the powers of arrest of constables.

These principles are reflected in legislation of Australia, Canada, and the United Kingdom with respect to the exercise of the power of arrest, legislation which is regarded in all three countries as extending to enforcement action under statutes applying in the various national maritime zones. However, there are differences in the legislation.

The Australian Crimes Act of 1914, section 3ZC, provides that "a person must not, in the course of arresting another person for an offence, use more force, or subject another person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest." For the purposes of customs, environmental, fisheries, and immigration laws, officials of the relevant departments, and naval officers, are merely "persons" within the meaning of this provision, subject to any other statutory powers they may have. The use of deadly force seems only to be envisaged at the hands of a constable:

(2) Without limiting the operation of subsection (1), a constable must not, in the course of arresting a person for an offence:

(a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the constable believes on reasonable grounds that doing that thing is necessary to protect the life or to prevent serious injury to another person (including the constable); or

(b) if the person is attempting to escape arrest by fleeing - do such a thing unless:
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(i) the constable believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the constable); and

(ii) the person has, if practicable, been called upon to surrender and the constable believes on reasonable grounds that the person cannot be apprehended in any other manner.

It must be assumed to be deliberate that officers engaged in maritime law enforcement have not been given the express power possessed by constables to use deadly force in self-defense or for the protection of others. The question poses itself: why not? It could hardly be that private persons do not have a right of self-defense; the criminal law allows this. The reason presumably must be that in a code dealing with powers of arrest, private persons are not to be encouraged to get so close to offenders that the question arises. If this is so, the absence of constabulary powers in maritime law enforcement officers is unjustifiable.

Sections 25, 26, and 27 of the Canadian Criminal Code govern the use of force in effecting an arrest and are regarded as applying also to the enforcement of fisheries laws. Under Section 25(3), the power possessed by any person to arrest another person, unlike under Australian law, does extend to “using force that is intended or is likely to cause death or grievous bodily harm [if] he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or anyone under his protection from death or grievous bodily harm.” Thus the defect under Australian law does not exist in Canada. Moreover, the powers given under the Code to “peace officers”—the statutory equivalent of a common law constable—are extended to members of the Canadian Forces by virtue of the definition of “peace officer” in the Code. This results in their having powers which, if exercised at sea, especially in the EEZ, might engage Canada in responsibility under international law for using excessive force. The following section of the Code would, at all events, seem to conflict with the arbitral decisions in the Red Crusader and I’m Alone cases, discussed above:

25(4). A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.
Fenrick comments that Section 25(4) gives “a somewhat distorted picture of the current state of Canadian law.” It has not been relied on in any reported cases of law enforcement at sea. He submits that “notwithstanding the wording of section 25(4) . . . HMC ships should not use force which is intended or is likely to cause death or grievous bodily harm for the purpose of enforcing fisheries legislation, unless such force is necessary for the defence of HMC ships or for the defence of some other person or vessel under her protection.” In other words, he submits that international law should be followed in preference to the literal wording of the legislation.

Exceptionally, national law may itself provide for a special regime of law enforcement applying under a particular enactment. This is the case of the peculiar—one might say flagrant—provision of Australian and Canadian customs legislation inherited from a British model.

The Australian Customs Act of 1901, Section 184, headed “Power to pursue ships and aircraft”, provides:

(1) Where the master of a ship refuses or fails to comply with a request . . . to permit the ship to be boarded, the person in command of any ship in the service of the Commonwealth . . . or any aircraft in the service of the Commonwealth . . . may use his ship or aircraft to chase, and, after firing a gun as a signal, fire at or into the first-mentioned ship in order to compel it to be brought to for boarding.

The equivalent Canadian legislation, the Customs Act, R.S.C. 1970, chapter C-40, section 141(5), is in essentially the same terms.

Their common ancestor is the British Smuggling Act of 1833, which consolidated various enactments going back to the early eighteenth century. The provision is retained, but in watered-down language—“may be fired upon”—in current United Kingdom legislation.

All three enactments are open to serious objection as being contrary to contemporary international law. The Australian legislation is even worse, as it also permits the same procedure to be applied to offending aircraft.

The case of the M/V Saiga, before the International Tribunal for the Law of the Sea, reveals that some other States extend quite draconian domestic legislation, normally applicable to land territory, against foreign vessels at sea. In that case, a vessel registered in Saint Vincent and the Grenadines was arrested in the exclusive economic zone of Guinea for alleged customs offenses. Force was used, and two members of the crew of the arrested vessel were wounded. The Penal Code of Guinea was cited in argument; it provides that “no crime or offense is committed in the case of a killing or wounding committed by the forces of order against offenders who as a flagrant offense

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smuggle at the border and have not complied with the usual demands. It was not necessary for the Tribunal, in the circumstances of the case, to judge the compatibility of this provision with international law.

The Enforcement of Domestic Laws in National Maritime Zones Against Citizens and Flag Vessels by Navies of the Enforcing State

Navies are often used in law enforcement roles in national maritime zones. In the case of States which do not have a separate coast guard, fisheries protection, or other similar non-naval service, it may be the only enforcement agency, or at least enforcement platform, available. The advantage of using navies is great when States with large maritime areas to protect are faced with incursions by technologically advanced and fast, distant-water fishing fleets. There is also an economy of scale and effort, where navies on training exercises may be diverted to law enforcement activities as required.

The disadvantages of using navies in a law enforcement role are chiefly two. Most obviously, navies are not primarily intended for law enforcement but for national defense. Undue diversion from their primary role is seen as undesirable. Second, the powers of naval officers to arrest persons are, at least in the case of the common-law countries, no greater than those of an ordinary citizen. Any additional powers required must be granted by statute. In this connection, there is the additional consideration, again at least in the case of the common-law countries, of the traditional reluctance to use the armed forces in the enforcement of laws against citizens.

In the United States, the Posse Comitatus Act forbids the use of the U.S. Army or Air Force to enforce domestic laws. This prohibition is extended, as a matter of policy, to the Navy and the Marine Corps. The United States Coast Guard exists for the enforcement of laws against both citizens and aliens. Statutory exceptions to the prohibition of the use of the Navy are allowed, and they have been made in the case of the counterdrug war. However, the Navy provides only the platform and the equipment; search, seizure, and arrest are carried out by Coast Guard personnel embarked. The prohibition is not as strict in Australia or Canada. Although naval officers have been invested with statutory powers of arrest under various statutes concerned with the enforcement of laws at sea, there is a reluctance to use these unless necessary, especially against citizens. Normally civilian officials holding powers under such legislation as that governing customs and fisheries are carried aboard.
Ivan Shearer

Into the Next Millenium

The modern international law of the sea is as unavoidable a feature of the arena in which armed conflict may be threatened, or actually conducted, as the limitations of the weapons platforms deployed and the state of the weather. Certain additional rights and duties arise under the law of armed conflict not applicable under the law of the sea in times of peace; but a knowledge of the law of the sea, and its inculcation in regular exercises, is an essential part of naval and air force training.

The enforcement of national laws at sea, in exercise of the rights to regulate the extensive maritime zones recognized by the LOS Convention and under customary international law, necessarily involves a projection of sovereignty or of national jurisdiction with a high potential to conflict with the rights and interests of other States. Disputes may arise concerning innocent passage through the territorial sea, straits transit, and archipelagic sea lanes passage and overflight, and the enforcement in the EEZ of laws not clearly warranted by the 1982 Convention or by international rules and standards laid down by competent international organizations or under international conventions adopted by diplomatic conferences consistent with the Convention. Disputed claims to sovereign rights or jurisdiction may lead to confrontation and the danger of eventual armed conflict. The international law of the sea will be invoked by one or both sides in justification of its position. The national law enforcement agencies, whether navies, coast guards, or other forces, acting in accordance with national laws and policies that may or may not be in accordance with international law, are the instruments by which that law may be violated or vindicated. The potential for mistakes or miscalculations can hardly be overstated.

The principle of graduated force58 underlies the measures that should be employed in order to achieve a de-escalation of the threat of violence and the peaceful resolution of disputes. It is vital that all maritime law enforcement agencies understand this principle and do not engage in actions that are needlessly provocative or escalatory. There is consequently a need for close coordination of all agencies, with joint training in common doctrine, and the observance of integrated rules of engagement in maritime law enforcement roles. Since navies, whether they are directly involved in law enforcement or not, have the ultimate responsibility of defending the nation against armed attack, it is logical that they should assume the primary responsibility for the development of doctrine and the coordination of enforcement procedures.

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It is evident that some States engage in more forceful measures in the purported exercise of their sovereignty, sovereign rights, or jurisdiction than is justified by international law. A developed international jurisprudence has not yet emerged. The reluctance of States to accept the compulsory jurisdiction of international courts and tribunals over questions of the manner of their exercise of enforcement powers has been noted. The obligation to submit disputes to settlement procedures under the LOS Convention, albeit affected by limitations and exceptions, has only existed for the parties to the Convention since its entry into force in 1994. The potential for those courts and tribunals to develop principles and rules in relation to maritime law enforcement may be realized in the early part of the twenty-first century.

Notes

2. These provisions are implemented in domestic law, e.g. Admiralty Act, 1988, sec. 22(4) (Austl.).
6. Churchill & Lowe, supra note 84.
12. LOS Convention, supra note 3, art. 68. Sedentary species are those creatures, such as clams and crabs, that are in constant contact with the seabed at their harvestable stage. Id., art. 77(4).
13. Id., arts. 56(3), 77(2).
14. Id., art. 55, speaks of the EEZ as a “specific legal regime” established by, and subject to the provisions of, the Convention. It is thus both sui generis and sui juris.

16. LOS Convention, supra note 3, art. 92.

17. Id., art. 91.

18. For example, the United States has formal agreements with a number of countries permitting the stopping, boarding and search of vessels under their flags on the high seas suspected of carrying illicit narcotics. It also has an agreement with Haiti regarding vessels engaged in unlawful immigration. For European practice implementing the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (28 I.L.M. 497), Article 17 of which provides for international cooperation in the interdiction of drugs at sea, see Gilmore, Narcotics Interdiction at Sea: The 1995 Council of Europe Agreement 20 MARINE POLY 3 (1996).

19. LOS Convention, supra note 3, art. 110(3).

20. Id., art. 111.


24. For reasonably close adaptations of these articles, see the Protection of the Sea (Prevention of Pollution from Ships) Act, 1983 (Austl.); the Environment Protection (Sea Dumping) Act, 1981 (Austl.).

25. For some examples of State practice, including Latin-American practice, see Fenrick, The Use of Force by Canadian Warships, 18 CAN. Y.B. INT'L L. 113, 135–142; 2 O'CONNELL, supra note 9, at 1071–1072.


27. Fitzmaurice, supra note 21, suggests that the fact that the attempted apprehension took place in a special customs zone outside territorial waters was a relevant factor, since a greater degree of force is often considered permissible in territorial waters. It is submitted, with respect, that this view is erroneous. Cf. Customs and Excise Management Act., ch. 2, sec. 91(2) (1979) (U.K.), which permits "firing upon" foreign ships in the territorial sea, after a warning shot, in the enforcement of the Act. This is a watering down of the earlier Smuggling Acts which permitted "firing at or into" delinquent vessels. See below.


29. Fenrick, supra note 25, at 133, regards the Red Crusader decision as setting "unduly stringent limitations on the legitimate use of force." While this is arguable, he does not take into account the regulatory nature of the offense.

30. The United States protested against the immediate resort to warning shots by the Soviet Navy in the case of an American cargo vessel which had left a Soviet port without exit clearance.
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31. The use of force by Australian naval vessels charged with law enforcement duties is notably restrained. Rules of engagement require that special authorization be given for the use of deadly force, except in self-defense. Since these rules are not public documents, it is impossible to offer criticism, either that they are too restrictive or too liberal in their allowance of the use of force. Nevertheless, it is clear that the rules should be constantly appraised and, if necessary, revised in the light of experience.

32. 23 L.L.M. 705 (1984). The Protocol requires 102 acceptances to enter into force. Russia and some 70 other States have so far deposited their acceptances.

33. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 220–221 (4th ed. 1991) citing the statement of the UK delegate. Whether Article 3 bis is stricter than existing custom is doubtful. Harris cites Hughes, Aerial Intrusions by Civil Airliners and the Use of Force, 45 J. AIR L. & COMM. 595, 619–620 (1980) for the view that custom allows the use of force as a last resort in response to a proportionate national security interest, and that this is wider than Article 3 bis allows. However, provided that self-defense is regarded as including the right of anticipatory or interceptive self-defense, this would not appear to be so. For the distinction between anticipatory and interceptive self-defense, see DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 190 (2nd ed. 1994).

34. LOS Convention, supra note 3, art. 287(1).


36. LOS Convention, supra note 3, art. 298(1)(b).

37. Id., art. 297(1).

38. Treves, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction, 55 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERSCHRECHT 421, 434 (1995). Treves states that the point can be argued either way and is not resolved by the travaux preparatoires. He rather discounts the importance of the possible holding that there is complete compulsory jurisdiction in relation to disputes arising in the territorial sea or archipelagic waters since "the cases in which the Convention regulates the sovereignty of the coastal state are very rare." However, he does not advert to states transit passage and archipelagic sea lanes passage nor to law enforcement generally in relation to these waters.

39. Sea Fisheries Act, ch. 77, sec. 10 (1968) (U.K.), provides that a British Sea Fishery Officer is not liable in civil or criminal proceedings provided he or she acts in good faith and with reasonable cause. See also the Customs Act, R.S.C. 1970, c. C–40, section 141(6) (Can.).


41. O’CONNELL, supra note 9, at 900 states that "there seems to be no doubt that any injury occurring on a foreign ship in British territorial or internal waters is governed by English law as the lex loci delicti," but cites no authority from case law. He argues that "there seems to be no logical basis in English law for distinguishing between foreign ships in ports and in the territorial sea."

42. Supra note 39.


44. REVISED STATUTES OF CANADA, R.S.C., ch. C–46 (1985); Ferrick, supra note 25, at 119.
45. Sec. 2, "peace officer," (f) (ii); Fenrick, supra note 25, at 120–121.
46. Fenrick, supra note 25, at 123.
47. British Smuggling Act, 1833, 3 & 4 Wm. IV, ch.53, sec. 8 (Eng.).
48. The Customs and Excise Management Act, 1985, ch.2, sec. 91(2) (U.K.). The section, however, applies now only to foreign vessels in the territorial sea of the United Kingdom. Sec. 88.
49. Customs Act, 1901, §184(2) (Aust.).
50. Unofficial translation of the Penal Code of Guinea, Article 363, cited by Judge Anderson in his dissenting opinion, para. 6: "Il n'y a ni crime, ni delit en cas d'homicide ou de blessures commises par les forces de l’ordre sur les personnes delinquants qui en flagrant delit se fraudent à la frontière et qui n’ont pas obtempré aux sommations d’usage." (The present writer has corrected several obvious infelicities in the translation supplied to the Tribunal by the applicants, but these have no bearing on the point under discussion.)
53. Id., at 363. The Posse Comitatus Act was originally enacted in 1878. 18 U.S.C. 1385.
54. Grunawalt, United States Navy/Coast Guard Cooperation in the War on Drugs at Sea, in MacKinnon & Sherwood, supra note 51, at 4.
56. Fenrick, supra note 25.
57. The Australian High Court rejected a challenge to the constitutionality of using naval officers in the enforcement of fisheries laws. Li Chia Hsing v. Rankin, 141 C.L.R. 182 (1978).
58. O’CONNELL, supra note 1, at 53–69.